

## DEPARTMENT OF STATE REVENUE

Revenue Ruling #2018-06ST  
January 7, 2019

**NOTICE:** Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

## ISSUES

## Sales and Use Tax - Requirement to Register as a Retail Merchant

Authority: [IC 6-2.5-2-1](#); [IC 6-2.5-3-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-5-20](#); [IC 6-2.5-6-1](#); *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018); Sales Tax Information Bulletin #29 (April 2016).

A taxpayer ("Company") is seeking an opinion as to the following issues:

1. Whether the sale of prepackaged food products to Indiana residents create nexus from an economic presence standpoint when the products are manufactured, sold and shipped from Arizona to Indiana customers via common carrier.
2. Whether all of Company's products are exempt from Indiana sales or use tax because they are prepackaged food products intended for human consumption.
3. If the scenario in question 1 above does create sales nexus in Indiana, whether Company would be required to register with the Indiana Department of Revenue for sales or use tax purposes.
4. If economic presence is established and Company is required to register for sales tax purpose with the Indiana Department of Revenue and the sale of food products is exempt from Indiana sales tax, whether Company would be required to file a "zero" return each month once Company registers with Indiana?

## STATEMENT OF FACTS

Company is an Arizona corporation that manufactures and sells baked goods such as brownies and cookies. Company provides the following information in support of its request:

[Company's] products are fully cooked food items which are individually wrapped, labeled and sold for human consumption. The food items are not sold heated and utensils are not included.

[Company] accepts orders for their products, from Indiana residents, via [Company]'s own web-page on the internet, via orders placed with Amazon and via telephone at their Arizona manufacturing facility. The products are then packaged in non-returnable containers and shipped to customers through a common carrier . . . All goods are manufactured in Arizona and all merchandise shipped to customers originates from Arizona.

Currently, [Company] is a remote seller, according to your own definitions, as [Company] does not have any offices, employees, inventory or property located in the State of Indiana. It is our opinion [Company] has not established any nexus through physical presence that would require it to register for sales or use tax purposes with the State of Indiana. However, [Company] is aware of the new economic nexus standards that were enacted, and which affect out of state retailers who sell to customers located in Indiana.

[Company] is not currently registered for sales/use tax purposes in the State of Indiana, does not have an Indiana revenue ID or employer withholding account number, is not under any type of audit, has not been a party and is not currently a party to any legal action with the Indiana Department of Revenue.

## DISCUSSION

Based on the foregoing facts, Company requests a determination as to whether it has a requirement to register in Indiana as a retail merchant and to collect Indiana sales tax. Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [IC 6-2.5-2-1\(a\)](#). Indiana also imposes a

complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." [IC 6-2.5-3-2\(a\)](#).

[IC 6-2.5-4-1\(a\)](#) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." A retail transaction is defined in [IC 6-2.5-4-1\(b\)](#) as the transfer, in the ordinary course of business, of tangible personal property for consideration.

Regarding the first issue, Indiana previously followed standards as set out by *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and then *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992), concerning a retail merchant's physical presence or contacts with the state in order to impose a requirement on the retail merchant to collect and remit Indiana sales tax. However, the Indiana General Assembly passed an amendment to [IC 6-2.5-2-1](#) in 2017 which requires a seller without a physical presence in Indiana (a "remote seller") to obtain a registered retail merchant's certificate and to collect and remit applicable sales tax, if the seller meets certain economic thresholds. [IC 6-2.5-2-1\(c\)](#) now provides the following:

(c) A retail merchant that does not have a physical presence in Indiana shall, as an agent for the state, collect the gross retail tax on a retail transaction made in Indiana, remit the gross retail tax as provided in this article, and comply with all applicable procedures and requirements of this article as if the retail merchant has a physical presence in Indiana, if the retail merchant meets either of the following conditions for the calendar year in which the retail transaction is made or for the calendar year preceding the calendar year in which the retail transaction is made:

- (1) The retail merchant's gross revenue from any combination of:
  - (A) the sale of tangible personal property that is delivered into Indiana;
  - (B) a product transferred electronically into Indiana; or
  - (C) a service delivered in Indiana;exceeds one hundred thousand dollars (\$100,000).
- (2) The retail merchant sells any combination of:
  - (A) tangible personal property that is delivered into Indiana;
  - (B) a product transferred electronically into Indiana; or
  - (C) a service delivered in Indiana;in two hundred (200) or more separate transactions.

Although the law was effective July 1, 2017, the Department began enforcing this statute effective October 1, 2018. Prior to October 1, the Department was enjoined from enforcing [IC 6-2.5-2-1\(c\)](#), in part because the United States Supreme Court was considering the constitutionality of a nearly identical law in the matter of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018). The opinion was finally issued in June of 2018. The state statute in that case also required sellers without a physical presence in South Dakota (i.e., "remote sellers") to collect sales tax because they met certain thresholds of having an "economic nexus" in the state, despite having no physical presence in the state. The United States Supreme Court upheld the statute's constitutionality, and furthermore overturned the court's prior decision in *Quill Corp. v. North Dakota*, such that physical presence is no longer required for sellers to be obligated to collect and remit sales taxes.

Because Indiana now imposes an economic nexus test on retail merchants instead of merely determining whether the merchant has a physical presence in Indiana, the sale of prepackaged food products to Indiana residents may create nexus from an economic presence standpoint even when the products are manufactured, sold and shipped by a remote seller from Arizona to Indiana customers via common carrier, as long as either of the thresholds in [IC 6-2.5-2-1\(c\)](#) are met. Therefore, transitioning to the second issue pertaining to the taxability of Company's food products, generally all purchases of tangible personal property are subject to sales and/or use tax unless an enumerated exemption from sales and/or use tax is available. One such exemption is found in [IC 6-2.5-5-20\(a\)](#), which provides that the "[s]ales of food and food ingredients for human consumption are exempt from the state gross retail tax." The statute goes on to provide the following:

- (b) For purposes of this section, the term "food and food ingredients for human consumption" includes the following items if sold without eating utensils provided by the seller:
- (1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
  - (2) Food sold in an unheated state by weight or volume as a single item.
  - (3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.**
- (c) Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food

ingredients for human consumption" does not include:

- (1) candy;
- (2) alcoholic beverages;
- (3) soft drinks;
- (4) food sold through a vending machine;
- (5) food sold in a heated state or heated by the seller;
- (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);
- (7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food);
- (8) tobacco; or
- (9) dietary supplements.

**(Emphasis added).**

Company's products would be considered bakery items, and since they are sold without utensils and are not sold in a heated state, sales of these bakery items would fall under the food and food ingredient exemption and would not be subject to sales and use tax in Indiana.

However, regarding the third and fourth issues, it is important to note that the thresholds in [IC 6-2.5-2-1\(c\)](#) apply regardless of whether any of the 200 transactions would have been subject to Indiana sales or use tax or whether any of the \$100,000 of revenue was generated by taxable sales. Therefore, even if none of the bakery items are subject to Indiana sales or use tax, if Company makes 200 transactions into Indiana or exceeds one hundred thousand dollars (\$100,000) in gross revenue in Indiana in the current or preceding calendar year, Company would be required to register as a retail merchant in Indiana. On the other hand, as long as Company only makes exempt sales, Company would only be required to file a "zero" return (meaning a return where no sales tax receipts are reported) each month once Company registers with Indiana. Furthermore, Company may possibly qualify for filing an annual "zero" return since its sales tax liability would be under one thousand dollars (\$1,000). [IC 6-2.5-6-1](#) provides the Department's standards for granting an annual sales and use tax filing in pertinent part as follows:

**(a) Except as otherwise provided in this section, each person liable for collecting the state gross retail or use tax shall file a return for each calendar month and pay the state gross retail and use taxes that the person collects during that month.** A person shall file the person's return for a particular month with the department and make the person's tax payment for that month to the department not more than thirty (30) days after the end of that month, if that person's average monthly liability for collections of state gross retail and use taxes under this section as determined by the department for the preceding calendar year did not exceed one thousand dollars (\$1,000). If a person's average monthly liability for collections of state gross retail and use taxes under this section as determined by the department for the preceding calendar year exceeded one thousand dollars (\$1,000), that person shall file the person's return for a particular month and make the person's tax payment for that month to the department not more than twenty (20) days after the end of that month.

...

**(c) Instead of the reporting periods required under subsection (a), the department may permit a retail merchant to report and pay the merchant's state gross retail and use taxes for a period covering a calendar year, if the retail merchant's state gross retail and use tax liability in the previous calendar year does not exceed one thousand dollars (\$1,000). A retail merchant using a reporting period allowed under this subsection must file the merchant's return and pay the merchant's tax for a reporting period not later than the last day of the month immediately following the close of that reporting period.**

**(Emphasis added).**

## RULING

Based on the information provided, Company is subject to the economic nexus tests of [IC 6-2.5-2-1\(c\)](#) and must use its exempt sales in determining whether it meets either threshold under that statute. If it has met either threshold in the current or preceding calendar year, Company must register with Indiana, either directly or through Streamlined Sales Tax, and file a return each month (or one return in a year if granted permission), even if such return reflects that zero tax is due.

### **CAVEAT**

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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